

IN THE
SUPREME COURT OF MISSOURI

No. SC85101

MARK A. VERDOORN,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

Appellant.

Respondent's Substitute Brief

LAW OFFICE OF JAMES D. BOGGS
James D. Boggs #24500
Picture Hills Centre
6406 N. W. Cosby
Kansas City, MO 64151
Telephone: (816) 587-6688
Fax: (816) 587-0133
ATTORNEYS FOR RESPONDENT

Table of Contents

Table of Authorities Cited.....	3
Jurisdictional Statement.....	4
Statement of Facts.....	4, 5
Points Relied on.....	6
Argument.....	7,8,9
Conclusion.....	10
Certification of Service.....	11

Table of Authorities

A. Court Decisions

<u>Anderson v. Director of Revenue</u> 944 S.W.2d 224 (Mo. App. WD 1997).....	7
<u>Green V. Director of Revenue</u> , 961 S.W.2d 936 at 938 (Mo. App. ED.1998).....	7, 8
<u>Kinzenbaw v. Director of Revenue</u> , 62 S.W.3d (Mo. Banc 2001).....	8
9 Wigmore, Evidence Section 2483-2498; 2499-2550.....	8
Black's Law Dictionary, 190, (7 th edition 1999).....	8

Jurisdictional Statement

The Respondent adopts the Jurisdictional Statement of the Appellant.

STATEMENT OF FACTS

The Respondent adopts the Statement of Facts of the Appellant. The Respondent challenged the Director's suspension of his driving privileges of operating a motor vehicle with a blood alcohol concentration of .10 or more. At the time of trial, the Respondent did not contest the legitimacy of the probable cause for his arrest or the lawfulness of his arrest for DWI. The sole issue was whether his blood alcohol concentration at the time of driving was greater than .10 percent. The Respondent's expert witness', Dr. William Watson's, credentials were not challenged by the Director (Tr. 7). Dr. Watson testified as follows:

“...my opinion to a reasonable degree of toxicological certainty, the exact concentration at the time of the first conduct is indeterminate because of the type of drinking that was involved, that it was, one, lower than 0.126 grams percent and, in fact, could have been either above or below 0.1 grams percent.

Q: Would it be fair to say that it was your opinion, however, that clearly it would have been below a .126?

A: Yes.

Q: Would it be fair to say that whether his blood alcohol concentration was above a .10 or

below or each of those possibilities are equally probable?

A: It is hard to put an exact mathematical value on it because of the difficulty in doing the calculations in a situation like this, but I have no information to tell me that it wouldn't be approximately...

Q: That it would be approximately what, Dr. Watson, I'm sorry?

A: Equally likely that it was above or below.

Q: The opinion that you've given, is that based upon certain scientific principals that are generally accepted in the profession of toxicology and pharmacology?

A: Yes. It is. (L.F. 10-11)

POINTS RELIED ON

The trial court did not err in setting aside the Director's suspension of the Respondent's driving privileges because the scientific testimony of the Respondent's toxicologist established that there was a fifty (50%) percent likelihood that the blood alcohol of the Respondent at the time of his arrest was below .10 percent and Section 302.500-545, RSMo. requires that the trial court in sustaining the Director's suspension find that the Respondent was arrested upon probable cause and was driving with a blood alcohol concentration of .10 percent or more. Kinzenbaw v. Director of Revenue, 62 S.W. 3d (Mo. Banc 2001), Green v. Director of Revenue, 961 S.W.2d 936 (Mo.App.ED. 1998), Anderson v. Director of Revenue, 944 S.W.2d 222 (Mo.App.WD 1997).

ARGUMENT

The trial court did not err in setting aside the Director's suspension of the Respondent's driving privileges because the evidence was established in the scientific testimony of a toxicologist that there was a fifty (50%) percent likelihood that the blood alcohol of the Respondent at the time of his arrest was below .10 percent and Section 302.500-545, RSMo. requires that the trial court in sustaining the Director's suspension find that the Respondent was arrested upon probable cause and was driving with a blood alcohol concentration of .01 percent. Green v. Director of Revenue, 961 S.W.2d 936 at 938 (Mo.App.ED. 1998), Anderson v. Director of Revenue, 944 S.W.2d 222 (Mo.App.WD 1997).

For the Respondent's driving privileges to be suspended, the Director must establish that the Respondent was arrested upon probable cause to believe that he was driving while intoxicated and that his blood alcohol concentration was .10 percent or more at the time of his driving. The Respondent in this case does not challenge the facts establishing probable cause or the legality of his arrest. He premises his case solely on whether the burden of proof has been met on the issue of his blood alcohol concentration at the time of driving.

Wigmore recognized that the burden of proof encompassed two concepts. First, it encompasses the notion that one party have the burden of going forward to establish a *prima facie* case. Secondly, the concept of burden of proof encompasses the concept of "the risk of non-persuasion". 9 Wigmore, Evidence Section 2483-2498; 2499-2550. Noting that the "risk of non-persuasion" was that duty of him who has the risk of any given proposition on which parties are at issue, "who will lose the case if he does not make this proposition out, when all has been said and done".

This Court recognized this distinction in Kinzenbaw v. Director of Revenue, 62 S.W. 3d 49,

53-54 (Mo. Banc 2001). There, the Court relying on Black's Law Dictionary stated that the burden of persuasion is "a party's duty to convince the fact-finder to view the facts in a way that favors that party". Black's Law Dictionary, 190 (7th edition 1999). The burden of producing evidence is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or directed verdict". *Id*

The Appellant in this case fails to note that the burden of non-persuasion on the Respondent driver in these cases is not to establish the positive existence of a fact, but is instead to prove the negative, i.e. that the Respondent's blood alcohol concentration was not .10 percent or higher. In Green v. Missouri Director of Revenue, the Eastern District in fact held that: "when the Director makes a *prima facie* case, the burden shifts to the driver to establish that his BAC was not at least .10 percent when he was driving". Green v. Missouri Director of Revenue, 961 S.W.2d 936 at 938 (Mo.App.ED. 1998). (emphasis mine)

Here, the sole and unchallenged scientific testimony presented by a Board Certified toxicologist and pharmacologist was that the driver in this case had a blood alcohol concentration that was equally likely to be above or below .10 percent at the time he was driving and arrested while driving while intoxicated. Respondent's position is that his risk of non-persuasion is to establish that his blood alcohol concentration was not .10 percent or higher. The Director would argue that it is the burden on the driver to establish a greater than fifty (50%) percent likelihood that the blood alcohol concentration was lower than .10 percent. That is the issue before this Court. It is the Respondent's position that the Respondent's risk of non-persuasion was not to prove a positive fact (that his blood alcohol concentration was lower than .10 percent), but merely to prove a negative fact, i.e. this blood alcohol concentration was not .10 percent or higher. Since it was the testimony of the toxicologist that the likelihood of a blood alcohol concentration of .10 percent or more was not greater than fifty (50%) percent, Respondent's burden was not met since as it is the responsibility of the trial court to sustain the Director's decision if, and only if, the trial court finds that the Respondent's blood alcohol concentration was .10 percent or higher.

CONCLUSION

The Respondent's risk of non-persuasion in this case was to establish that the blood alcohol concentration of the Respondent was not .10 percent or higher. This burden was met by establishing that the likelihood of the Respondent's blood alcohol concentration of being .10 percent or higher was not greater than fifty (50%) percent.

Accordingly, the Respondent respectfully suggests that the decision of the trial court should be sustained.

LAW OFFICES OF JAMES D. BOGGS

James D. Boggs #24500
Picture Hills Centre
6406 NW Cosby
Kansas City, MO 64151
Telephone: (816) 587-6688
Fax: (816) 587-0133
ATTORNEYS FOR RESPONDENT,
MARK A. VERDOORN

CERTIFICATE OF COMPLIANCE WITH

RULE 84.06(C) AND OF SERVICE

Pursuant to Rule 84.06(b) ©) I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03(a) and (b); that it contains 231 lines and 1532 words and complies with the word/line limitations contained in Rule 84.06(b); that a diskette of the Brief is included herewith in WordPerfect 10 format; that the diskette was scanned for virus using McAfee Virus Scan and found to be free of virus; and that one copy of the diskette and one copy of Respondent's Brief were mailed, by U.S. Mail, postage prepaid, this ____ day of June, 2003, to Cheryl Caponegro Nield, Associate Solicitor, Broadway State Office Building, 221 West High Street, 8th Floor, P.O. Box 899, Jefferson City, Missouri 65102.

James D. Boggs